In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 932

DARRELL D. MACINTYRE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, an attorney, was permitted to enter a plea of *nolo contendere* to a charge of willful attempt to defeat and evade payment of $6,787.09 in income taxes for 1959. On March 24, 1966, he was sentenced to six months' imprisonment and fined $5,000.[1] Thereafter, he filed a timely motion to reduce his sentence, or, in the alternative, to stay the sentence and admit him to probation. (R. 2; Supp. R. 3–6.)[2] No

[1] 26 U.S.C. 7201 authorizes imposition of a sentence of five years' imprisonment or a $10,000 fine, or both.

[2] The record is composed of the printed appendices filed by the parties in the court below. "R." references are to petitioner's appendix and "Supp. R." references are to the Government's appendix B, in that court.

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grounds for relief, other than allegations of hardship suffered and expected by reason of the conviction, were asserted in the motion (R. 4–5), which was denied on May 16, 1966 (R. 3). Following the denial of that motion, petitioner filed a notice of appeal from the judgment of conviction and the sentence imposed on March 24, and from the May 16 denial of his motion for reduction of sentence.

The government moved to dismiss the appeal; the court of appeals entered an order docketing the appeal from the denial of the motion for reduction of sentence, the appeal being untimely filed with respect to the March 24 judgment. The case was briefed and argument heard. On November 2, 1966, the court of appeals issued a memorandum opinion (Pet. App. A):

> The defendant appeals from a denial of his motion under Rule 35 of the Federal Rules of Criminal Procedure for probation or a reduction of sentence. We are not authorized to reduce or modify a sentence or order the trial court to do so under the circumstances of this case. *Bryson* v. *United States*, 265 F. 2d 9 (9th Cir.), cert. denied, 360 U.S. 919 (1959); *United States* v. *DeMarie*, 261 F. 2d 477 (7th Cir. 1958).
>
> The record of the district court shows that by its order of May 16, 1966, the court not only refused to reduce or change the sentence imposed on defendant but also denied his motion that he be placed on probation. *Cf. United States* v. *Wiley*, 278 F. 2d 500 (1960); *United States* v. *Wiley*, 267 F. 2d 453 (1959), where we reversed the court below for refusing to

> entertain or rule on an application for probation because of a standing policy in that court that once a defendant stands trial, rather than pleads guilty, probation would not be considered by the court.
>
> The appeal is dismissed.

Petitioner contends (Pet. 8–10) that the court should not have dismissed his appeal since he presented a non-frivolous issue: whether the trial court abused its discretion by imposing a greater sentence on petitioner because he is a lawyer, than it had imposed on a non-lawyer in an unrelated case (Pet. 2, 4–5). Plainly this case does not call for review by this Court.

1. It should be clear from a reading of the complete transcript of the sentencing hearing (Supp. R. 7–13) that the trial judge did not invidiously discriminate against petitioner because the latter is a lawyer, petitioner's protestations to the contrary notwithstanding (Pet. 2, 4–5). That petitioner is a lawyer, however, was properly considered, for that professional status, involving opportunity—indeed, responsibility—for keener appreciation of one's legal obligations, certainly bore upon petitioner's culpability.

In light of the sentence that could have been imposed (note 1, *supra*), it is evident that the trial judge was lenient in sentencing petitioner. That he was more lenient in sentencing an artist a month earlier on a similar offense (Pet. 4–5), is hardly an adequate ground for relief.[3]

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[3] The artist was fined $10,000, but received no prison sentence.

Moreover, we note that petitioner did not raise the issue of disparate treatment and inequality in sentencing in the motion for reduction of sentence, the denial of which he appealed. That issue was first raised in the course of his argument on a motion for bail pending appeal (R. 12). Therefore, that issue not being presented by the appeal, the court of appeals properly dismissed the appeal from the denial of the motion in which petitioner sought reduction of his six-month sentence solely because of hardship, grounds which petitioner does not now assert to be meritorious.

2. In any event, in the circumstances of this case, petitioner's emphasis on the distinction between dismissal and affirmance (Pet. 2, 8–11) is an exercise in semantics. The court below denied a motion to dismiss the appeal, accepted briefs, and heard oral argument; petitioner, therefore, had his day in court. Accordingly, his reliance (Pet. 10) upon cases involving the dismissal of indigents' appeals as frivolous prior to full consideration,[4] or those involving the standards for the withdrawal of counsel in such cases,[5] is misplaced.

To be sure, if the decision below could properly be characterized as manifesting a refusal to reach the merits of the issue tendered by petitioner for, say, jurisdictional reasons, the issue he seeks to raise here—whether an appellate court may review the exercise of sentencing discretion by the district

[4] *E.g.*, *Bandy* v. *United States*, 364 U.S. 477.

[5] *E.g.*, *Johnson* v *United States*, 360 F. 2d 844 (C.A.D.C.); *Rumph* v. *United States*, 343 F. 2d 580 (C.A. 5).

court[6]—might be viewed in a different light. However, petitioner recognizes (Pet. 11), and we agree, that the ruling below was on the merits of his claim for relief.[7] So long as the court fully considered the case and found it short of error requiring reversal, it is of little significance that the court might have deemed it "so devoid of merit," *United States* v. *Johnson*, 327 U.S. 106, 111, as to warrant dismissal, rather than merely affirming the judgment from which the appeal was taken. The effect to petitioner is precisely the same in either event. See, *e.g.*, *Page* v. *United States*, 356 F. 2d 337, 339 (C.A. 9); *Brown* v. *United States*, 293 F. 2d 149, 150 (C.A.D.C.)

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] We point out that the court below has been willing, in what it has considered to be appropriate cases, to correct abuses in the sentencing process. See *United States* v. *Wiley*, 267 F. 2d 453 (C.A. 7) (reversing arbitrary denial of probation); *United States* v. *Wiley*, 278 F. 2d 500 (C.A. 7) (reversing imposition of a sentence imposed as a penalty upon the defendant for electing to stand trial).

[7] We note, also, that both parties in the court below briefed the issue of the sentence disparity.

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